(1) 83-1783

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

R. J. D'HEMECOURT PETROLEUM, INC.
ET AL

Petitioner

versus

SHIRLEY MCNAMARA, SECRETARY OF
THE DEPARTMENT OF REVENUE, STATE
OF LOUISIANA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

76 pp

QUESTIONS PRESENTED

1. Whether a state may enact an occupational license tax that discriminates against a certain class of retailers whose profits are controled by federal regulations when there is no rational basis for the greater burden on said class of retailers?

PARTIES

Petitioners are a class of gasoline retailers domiciled and doing business in the State of Louisiana

Respondent is the State of Louisiana through its department of revenue.

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OPINIONS BELOW

The opinions of the Supreme Court of the State of Louisiana, not yet reported, appears in Appendix A-1 hereto. The Written Reasons for Judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, not published, appears in Appendix C-1 hereto.

JURISDICTION

The Judgment of the Supreme Court of Louisiana was entered on November 28, 1983. Petitioners' Motion for Rehearing was denied on February 2, 1984. This petition for certiorari was filed within minety (90) days of that date as prescribed in 28 U.S.C. section 2101(c). This Court's jurisdiction is

invoked under 28 U.S.C. section 1257(3).

STATUTORY PROVISIONS INVOKED

United States Constitution, Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

La.R.S.47:351. Wholesale dealers in merchandise. (As amended 1979):

C. In calculating the gross sales at bulk or distributing plants engaged in the storage and sale of petroleum products, the taxpayer shall exclude therefrom that part of the purchase price paid by him for gasoline, motor fuels or lubricating oils as shall equal the manufacturer's or dealer's license, privilege or excise tax levied by federal or state statutes on the manufacturing, handling, storing, selling or consuming of gasoline, motor fuels, or lubricating oils; and such taxpayer shall be taxed at fifty percent (50%) of the rate provided in Subsection A of this Section whether paying under the provisions of this Section or as a

wholesale dealer selling to certain consumers as provided in Section 353.1 until such time as federal margin-of-profit controls on gasoline are no longer applicable to the taxpayer's business; but nothing herein contained shall be construed as amending, altering or modifying any other Section of this Chapter.

La.R.S.47:353 Retail dealers; restaurants; operators of coin vending and weighing machines.

For every business of selling merchandise, soda water, ice cream, confections, soda pop, coca-cola, cherocola, grapico, or other similar soft drinks or beverages or refreshments, at retail; or for the business of operating a restaurant, tea room, coffee house or other eating house, establishment or

place where any charge whatsoever is made for any food, drink or service, whether attached to or conducted separate and apart from any other business; or for the business of operating vending machines or weighing machines, except those operated for the cooling and vending of bottled soft drinks, not otherwise provided for this chapter, or by special laws, whether the business be conducted as principal, agent or commission or otherwise, the license shall be based on the gross sales. The amount of this license shall be as shown in the following table:

If the Gross Sales are: As Much as	But Less Than:	The Annual License Shall Be:
$ 0	$ 5,000	$ 5
5,000	10,000	10

10,000	15,000	15
15,000	20,000	20
20,000	25,000	25
25,000	30,000	30
30,000	40,000	35
40,000	50,000	50
50,000	75,000	60
75,000	100,000	90
100,000	150,000	120
150,000	200,000	180
200,000	250,000	250
250,000	300,000	300
300,000	400,000	360
400,000	500,000	500
500,000	600,000	650
600,000	750,000	800
750,000	1,000,000	900
1,000,000	1,500,000	1,200
1,500,000	2,000,000	1,800

2,000,000	2,500,000	2,400
2,500,000	3,000,000	3,000
3,000,000	3,500,000	3,600
3,500,000	4,000,000	4,200
4,000,000	4,500,000	4,800
4,500,000	5,000,000	5,400
5,000,000	.....	6,000

For each separate establishment where more than one such establishment is kept or conducted by the same person, there shall be a separate license, as herein fixed, provided that in the case of a business of operating coin vending or weighing machines, a separate license shall not be required for each place or establishment where the machines are operated. No license shall be imposed under this Chapter for selling or serving food or drink for charitable or religious purposes.

In calculating the gross sales at retail gasoline filling and service stations, the taxpayer shall exclude therefrom that part of the purchases price paid by him for gasoline, motor fuels, or lubricating oils as shall equal the manufacturer's or dealer's license, privilege or excise tax levied by federal or state statutes on the manufacturing, handling, storing, selling or consuming of gasoline, motor fuels or lubricating oils; but nothing herein contained shall be construed as amending, altering, or modifying any other section of this Chapter.

STATEMENT OF THE CASE

Petitioners are a class of gasoline retail merchants domiciled and doing business in the State of Louisiana. As such they are subject to the provisions of the Louisiana Occupational License Tax, La.R.S.47:353. The scheme of that tax is predicated upon a percentage of gross sales rather than profits, with scheduled increases in gross sales accounting for a higher percentage of occupational license tax.

In 1979-80 petitioners were subject to federal "margin of profits" regulations, which placed a ceiling on the maximum cents per gallon profit that could be earned by retail gasoline dealers. Regardless of the price per gallon at which the gasoline was ultimately sold, a retailer was not allowed to earn in profit more than the federally imposed maximum. In June, 1979, the price margin was fixed at 15.4 cents per gallon. In December, 1979, it was adjusted to 16.1 cents per gallon. In June, 1980, to 16.8 cents per gallon, and in December 1980 to 17.7 cents. See 10 C.F.R. Section 212.93. Consequently, unlike any other retailer subject to the Louisiana Occupational License Tax only

petitioners were subject to an absolute federally fixed margin of profit, which assured that rising sales would not reflect proportioned increased profit, though it would assure increased occupational license taxes.

This burden became intolerable during 1979-80 when cutbacks in world oil supplies drove the wholesale price of gasoline to an all-time high. This resulted in much higher pump prices, but no more retail profit due to the federal regulations. Consequently, petitioners were driven into much higher tax catagories due to higher gross sales resulting from higher prices, but with no increased profit.

To add insult to petitioners' injury, in 1979 the Louisiana

legislature amended La.R.S.47:351 to reduce the taxes paid by gasoline wholesalers by fifty percent "until such time as federal margin-of-profit controls on gasoline are no longer applicable to taxpayer's business". The result of this change was to recognize the plight of the only other retailer uniquely burdened by the federal regulations, but to ignore the exact burden as suffered by petitioners.

In 1981 the discrimination and its attendant burden became so intolerable that petitioners paid their taxes under protest, as provided in La.R.S.47:2110, and filed the instant class action to have the tax declared violative of the

equal protection clause of the constitution of the United States.

After a trial on the merits in the Nineteenth Judicial District, Judge Brown declared the Louisiana Occupational License Tax unconstitutional as violative of the fourteenth amendment equal protection clause. The trial court concluded that the tax had a disparate and discriminatory effect on petitioners due to the federal regulations, and that there could be no rational basis for this treatment.

After appeal by the State to the Supreme Court of Louisiana the trial court decision was reversed because that court found the classification had a "rational relationship to a

legitimate government purpose, raising revenue". Petitioners made timely application for rehearing, which was denied, but only over the written objections of three members of the court including the original opinion writer.

Reasons For Granting the Writ

I.

A.

The Louisiana Supreme Court Erred In Finding A Rational Basis For The State's Discrimination Against Petitioners In The Application Of The Occupational License Tax To Them.

Petitioners' objection to the Louisiana Supreme Court's ruling is quite simple: that Court found a rational basis for discrmination where no such basis exists. This finding is

at odds with relevant precedents of this Court, and establishes an unacceptable standard for federal equal protection analysis of state tax laws.

Specifically, the Louisiana Court's holding can be reduced to one sentence: "[The statute] has a rational relationship to a legitimate government purpose, raising revenue". Supreme Court opinion at A-9. Clearly, the Court was wrong in how it framed its inquiry. It is not the statute that must bear a rational relationship to a legitimate government purpose, but rather the discriminatory application and effect vis a vis petitioners. On that point the lower Court offers no explanation of how the discriminatory effect of the challenged statute can be

rationally based. Indeed, carried to its logical conclusion, the Louisiana Court's holding would permit the grossest of tax discrimination with impunity. If a tax statute need only raise revenue to be rational then could not the state tax only red-headed persons, or those who failed to support the governor's reelection, or those who sell non-Louisiana made products? To have focused on the revenue raising as the sole source of rationality is to have created an intolerable potential for unredressable discrimination. Indeed, a facially neutral tax that has a grossly discriminatory impact would be immune from constitutional attack. Such a view is simply incorrect under this Court's precedents, and according

to the most careful thinking on the subject.

B.

This Court has addressed the issue of equal protection and state taxation any number of times, and as will be seen the standard consistently used to measure constitutionality in these cases is one of rationality. Indeed, this was the standard applied by the trial court. Because this standard is far more perplexing than it appears, and because it has confounded many constitutional scholars, see Tussman and ten Broek, The Equal Protection of the Laws, 31 Calif.L.Rev.341 (1949), some preliminary comments are in order.

> "Equal protection is the guarantee that similar people will be dealt with in a similar manner

> and that people of different circumstances will not be treated as if they were the same". J. Nowak, et al, Handbook on Constitutional Law 520 (West, 1978). (Emphasis added).
>
> To provide such scope, equal protection came to be seen as requiring "some rationality in the nature of the class singled out", with rationality tested by the classification's ability to serve the purpose intended by the legislature or administrative rule: "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . ." L.Tribe, American Constitutional Law 995 (Foundation Press,1978). (Emphasis added).

Furthermore, it is clear that the "legislation must have a legitimate public purpose or set of purposes based on some conception of the general good". Tribe, supra at 995.

What all this means, is that the rationality standard refers to an

assessment of a statute's recognition of legitimate differences among classes, which must be respected and which must be directed toward some legitimate governmental end. Clearly, La.R.S.47:353 fails that test. The unquestionable end of section 353 is to raise revenue, but only through some fair and graduated means. The assumption, apparent on the face of the statute is that increasing gross sales are evidence of increased business activity and profit, an assumption ordinarily true. Yet, as has been noted, the assumption fails when applied to petitioners who are bound by federal profit margin controls. Consequently, the scheme, as to them,

is not a rational means to achieve the end of fair and proportioned taxation.

Appropriate cases bear out this analysis. While it is true that the questioned scheme would ordinarily pose no problem it must be remembered that here the complaint is not simply that higher gross sales equal higher occupational license taxes, indeed that would not trouble petitioners. The complaint here is that higher gross sales equal a higher tax, and because of the federal restrictions, lower profits.

One case uniquely applicable, not for its exact facts, but for its specific reasoning, is Stewart Dry Goods Co. v. Lewis, 294 U.S.550 (1953). The issue in Lewis was the

validity of a Kentucky annual gross sales tax that was imposed on a graduated basis varying from 1/20th of one percent on the first $400,000 of gross sales to one percent on gross sales in excess of $1,000,000. This Court concluded that the tax was arbitrary and violated principles of equal protection. Primary among the reasons for invalidating the tax was the acceptance of an argument very similar to that now before this Honorable Court. This Court's discussion is helpful:

> "[The State] insists the amount of the tax is merely measured by the volume of sales, and in this view the classification is not arbitrary if any reasonable relation can be found between the amount demanded and the privilege enjoyed. They endeavor to deduce such a relation from the alleged

fact that a merchant's net income and his consequent ability to pay increase as the volume of sales grows. The argument does not advance the case for the validity of the statute. Even in this aspect the classification is arbitrary, for the claimed relation of gross sales -- the measure of the tax -- to net profits fails to justify the discrimination between taxpayers.

The district court found that "generally speaking" he who sells more is in receipt of a greater profit and hence has larger ability to pay, and upon this basis justified the classification. But it is to be remembered that the act in question taxes gross sales and not net income

A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. . .

Argument is not needed, and

> indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profit; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume. . . The best that can be said. . . is that averaging the results of the concerns making the report in evidence it is true "generally speaking", . . . that profits increse with sales. Id. at 555-559 (Emphasis added).

This Court went on to hold that this "general" relationship was not adequate to sustain the tax, and that it was "an arbitrary and unequal imposition as between persons similarly circumstanced". Id. at 563.

Lewis is in ways similar and dissimilar to the instant case. However, the similarities preponderate.

While Lewis dealt with varying tax rates on gross sales, the instant case involves a graduated flat fee for an occupational license. But the underlying concerns are exactly the same. In Lewis, as in section 353, the assumption is that profits and ability to pay rise with sales. In Lewis, as in the instant cases, that is only generally true. In Lewis this Court mentioned several examples of taxpayers whose sales went up, whose tax went up, but whose profits went down: "A merchant having a gross business of $1,000,000, but a net loss, must pay a greater tax than one who has a gross of $400,000, and realizes a substantial net profit". Id. at 560. This is exactly the problem with

section 353. Given the federal profit limits petitioners' sales can go up along with their tax, but their profits will go down, partly due to the tax. As in Lewis this scheme, as to petitioners, is arbitrary and unreasonable.

Sunday Lake Iron Co. v. Wakefield, 247 U.S.350 (1917) also speaks to the question of what constitutes arbitrary classfications in tax laws. In Wakefield, plaintiff alleged that his property had been assessed at a higher value than others. In assessing his attack this Court held:

> "And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constituional rights of one taxed on full value of

his property." Id.at 353
Accord: Sioux City Bridge
Co. v. Dakota County, 260
U.S.441 (1922).

Clearly, the principle applies here because simply stated Wakefield holds that the state cannot systematically overburden one taxpayer while favoring others of the same class. Under section 353 that is precisely what happened.

Ohio Oil Co. v. Conway, 281 U.S.146 (1929) involved a challenge to Louisiana's oil severance tax. The only objection raised by the taxpayers was related to distinctions made among classes of oil. While this Court found the distinctions to be rational they indicated the limits to such decisions:

"With all this freedom of action, there is a point beyond which

> the state cannot go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'" Id. at 160 (Emphasis added).

D.H. Holmes, Inc. and Clearview Amoco are similarly situated Louisiana retailers. D.H. Holmes may make as much profit as it can; Clearview's is strictly limited. Section 353 taxes each without regard to this fact. How can it be said that similarly situated persons are being treated alike?

Similarly, Cumberland Coal Co. v. Bd. of Revision, 284 U.S.23 (1931) emphasizes the need for fair and similar treatment among comparably situated individuals. Cumberland involved an attack on the assessment of coal in a county of Pennsylvania. Petitioners alleged that the valuation placed upon their coal was unjust and discriminatory because it was all at the same value "regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation. . ." Id. at 24. The Court struck down the assessment because it was arbitrary not to take into consideration the other factors mentioned, which would affect the actual value of the coal. In the

instant case the State of Louisiana failed to take into consideration the "actual value" of Plaintiffs' gross sales when they ignored the federal profit limits.

To further elucidate the obligation of the State, reference should be made to the analogous case of Hellsbrorough v. Cromwell, 326 U.S.620 (1945), which involved an objection to consistent overvaluation of plaintiff's property for tax purposes. This Court rejected the argument that plaintiff had an adequate remedy via the state procedure whereby plaintiff would have to seek the increase of other taxpayers' valuations. As Justice Douglas said in striking the assessment:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a state does not itself remove the discrmination. . ." Id. at 623.

Petitioners before this Court seek nothing more than equal treatment, and look to this Court to place that burden on the State by affirming the trial court finding of unconstitutionality.

II.

The Louisiana Supreme Court Erred In Not Reaching The Question of Facial Invalidity After The 1979 Amendment To The Occupational License Tax.

The Louisiana Occupational License Tax, after the 1979 amendment, is unconstitutional on its face. In 1979 by Act No. 612 the Louisiana Legislature amended that part of the Occupational License Tax that applied to petroleum wholesalers. See La.RSA 47:351 as amended. The amendment reduces the tax for such wholesalers by 50% "until such time as federal margin-of-profit controls on gasoline are no longer applicable to the taxpayer's business. . ." By this change the legislature singled-out the similarly situated gasoline retailer for oppressive and unreasonable discrimination. There can be no rational explanation for the State recognizing the problem and only

granting relief to half of the class burdened by it. This is especially true since the change can only be said to advance a valid government purpose if it is intended to reinstitute uniformity. Clearly, it is not intended to increase revenue since its effect will be to reduce revenue. If, then, the amendment attempts to remedy discrimination it must do it for the entire disadvantaged class.

Sunday Lake Iron Co. v. Wakefield, supra, recognized this principle when it admitted that discriminatory tax assessments violated equal protection, but granted no retrospective remedy because the tax officials demonstrated good faith when "[t]he very next year a diligent, and,

so far as appears, successful, effort was made to rectify any inequality". Id. at 353. Clearly, if the officials had only rectified the inequality as to a few, or even half of the burdened taxpayers, good faith could not be presumed, and the remaining discrimination could not be tolerated.

Consequently, all that was said in Part I above is applicable with greater force after the 1979 amendment. The failure to extend the amendment to retailers supplies additional support for finding, as the trial court did, an unconstitutional classification created by state action.

CONCLUSION

Petitioners have been denied equal protection by the discriminatory

application and amendment of the Louisiana Occupational License Tax. They suffered uniquely by virtue of their profit having been subject to a federal profit restriction that was not recognized by the tax statute. There was, as the trial court said, no rational basis for this burden being placed exclusively upon petitioners. Indeed, the Louisiana Supreme Court itself barely escaped rehearing this case when three of seven Justices moved from the majority and voted to rehear the instant case. Notably, one of the three Justices favoring rehearing was the original opinion written himself.

In Justice Calogero's reasons for rehearing he concluded:

[B]ecause La.R.S.47:353 during

> the time in question affected not only those retailers to whom higher gross sales meant higher profits, but also those retailers (gasoline) to whom higher gross sales did not mean higher profits (because of the imposition of the federal margin of profits regulation), the statutory classification may have been overinclusive and so subject to an equal protection challenge.
>
> Calogero opinion at B-4

The reason for his concern was highlighted in a footnote:

> 10 C.F.R.Sec.212.93 set a ceiling on the cents per gallon profit that gasoline retailers could earn, regardless of the selling price per gallon. Therefore while the margin of profit allowed gas retailers per gallon under the federal regulations rose almost imperceptibly during 1979 and 1980, the price of that gallon of gasoline (and therefore the gross sales of gasoline retailers) increased over 100 percent.
>
> Id. at N.1. (Emphasis added).

Consequently, this grave injustice must be remedied, and this Court should grant this Writ of Certiorari and conduct a complete review.

CERTIFICATE OF SERVICE

Undersigned counsel for petitioners certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

Howard M. Romain, Esq.
Department of Revenue & Taxation
P. O. Box 4065
Baton Rouge, La. 70802

BASILE J. UDDO

Dated May 1, 1984

APPENDIX A-1

SUPREME COURT OF LOUISIANA

NO. 83-CA-1231

R.J. D'HEMECOURT PETROLEUM, INC., ET AL

VERSUS

SHIRLEY MCNAMARA, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION STATE OF LOUISIANA

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTIRCT COURT, PARISH OF EAST BATON ROUGE, HONORABLE WILLIAM H. BROWN, JUDGE

WATSON, Justice.

In this class action suit by Louisiana retail gasoline merchants, plaintiffs asked that LSA-R.S.47:353[1] be declared unconstitutional as to them and occupational license taxes paid under protest be refunded. The trial court declared the law unconstitutional and ordered the refunds.

LSA-R.S.47:2110.[2] The Secretary of the Louisiana Department of Revenue and Taxation has appealed.[3]

At the outset of trial, all parties stipulated to the class as being all retail gasoline merchants who paid the occupational license tax under protest for the years 1979 and 1980 (Tr.3) A list of such merchants was placed into the record (S-1).

A stipulation has the effect of a judicial admission or confession,[4] which binds all parties and the court. Placid Oil Company v. A.M. Dupont Corporation, 344 La. 1075, 156 So.2d 444 (1963). Stipulations between the parties in a specific case are binding on the trial court when not in derogation of law. Wickliffe v. Cooper

and Sperrier, 161 La.417, 108 So.791 (1926). Such agreements are the law of the case.[5] The class action was appropriate.

In declaring LSA-R.S.47:353 unconstitutional, the trial court found that its interaction with federal "margin of profits" regulations[6] produced a discriminatory effect upon retail gasoline merchants in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Art.I, Sec.3, Louisiana Constitution of 1974.[7]

Under Section 353, the tax becomes larger as gross sales increases. Although the wholesale price of gasoline soared in 1979 and 1980 due to cutbacks in supply by oil producing

countries, plaintiffs' retail profits were curtailed by federal limitations. Plaintiffs claim that these federal limits on their profits distinguish them from other retail merchants resulting in a discriminatory tax burden from the occupational license tax.

Statutory classifications do not violate equal protection guarantees if they bear a rational relation to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right or employ a suspect classification. Harris v. McRae, 448 U.S.297, 100 S.Ct.2671, 65 L.Ed.2d 784 (1980). The

tax on retail gasoline merchants does neither.

Legislators have broad latitude in creating tax classifications. In Regan v. Taxation with Representation of Washington, __ U.S. ___ at ___, 103 S.Ct.1997 at 2002, 75 L.Ed.2d ___ at ___ (1983) the court stated:

> "'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... in taxation, even more than in order fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to

> negative every conceivable basis which might support it.' Madden v. Kentucky, 309 U.S.83, 87-88, 60 S.Ct.406, 407-408, 84 L.Ed. 590 (1940) (footnotes ommitted)."

State taxes with the collateral effect of restricting or even destroying a business or occupation have been sustained. Lehnhausen v. Lake Shore Auto Parts, 410 U.S.356, 360, 93 S.Ct. 1001, 1004, 35 L.Ed.2d 351, 355 (1973).

In Acorn v. City of New Orleans, 377 So.2d 1206 (La.,1979) there was a constitutional challenge to a city ordinance which imposed a one hundred dollar annual charge on each parcel of real property separately listed on the tax rolls. Although the tax had a disproportionate impact on owners of

small and large tracts, the city ordinance was upheld:

> "The Equal Protection Guarantee of the Fourteenth Amendment does not take from the States all power of classification. Massachusetts Bd. of Retirement v. Murgia, 427 U.S.307, 314, 96 S.Ct. 2562, [2567], 49 L.Ed.2d 520. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. New York Transit Authority v. Beazor, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587; Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, [1732], 32 L.Ed.2d 285. Cf.James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility...." 377 So.2d at 1216-1217.

To be unconstitutional, a classification must be manifestly arbitrary and unreasonable, and not possibly so. Gulf States Utilities Co. v. Traigle, 310 So.2d 78 (La.,1975). A discriminatory purpose is not presumed.

Parties attacking a statute must bear the burden of proving clear and intentional discrimination. Louisiana & Arkansas Railway Company v. Goslin, 300 So.2d 483 (La.,1974).

These service station owners lost profits because the product they sold cost more and there was a diminished quantity available for sale. This situation was exacerbated by federally imposed profit limitations. However, no evidence has been offered that other

retail merchants subject to the tax did not suffer from similar adverse circumstances.[8] Thus, these retail gasoline merchants have failed to distinguish themselves from other retail merchants. The pressures of the market place could have acted in the same manner as the federal profit controls to limit other retailers' gross profits.

The statute creates a class of retailers taxed on a sliding scale based on gross profits. It has a rational relationship to a legitimate government purpose, raising revenue. While the tax may have a disproportionately greater impact upon retailers subject to federal profit

controls, no violation of equal protection has been proven.

For the reasons assigned, the judgment of the trial court is reversed and plaintiffs' suit is dismissed.

REVERSED.

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[1] See appendix to this opinion.

[2] LSA-R.S. 47:2110 provides, in pertinent part:

"A. No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by

law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, such amount so segregated shall be further held pending the outcome of the suit. If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the rate of two per centum per annum for the period from the date such funds were received by the officer to the date of such refund."

[3] LSA-Const. Art. V, Sec.5(D) provides:

> "In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional...."

See Southland Corp. v. Collector of Revenue for Louisiana, 318 So.2d 23 (La.,1975).

[4] LSA-C.C. art. 2291 provides:

"The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding.

"It amounts to full proof against him who has made it.

"It can not be divided against him.

"It can not be revoked, unless it be proved to have been made through an error in fact.

"It can not be revoked on a pretense of an error in law."

[5] The argument that LSA-R.S.47:1576 provides an exclusive means by which taxpayers may judicially dispute tax assessments is pretermitted. The parties here are bound by their stipulation.

[6] 10 C.F.R. Section 212.93 places a ceiling on the maximum cents per gallon profit which can be earned by retail gasoline merchants. Regardless of the price per gallon at which the gasoline is ultimately sold, a retailer cannot earn in profit more than the federally imposed limit. In June, 1979, the price margin was fixed at 15.4 cents a

gallon. In December, 1979, it was adjusted to 16.1 cents; in June, 1980, to 16.8 cents, and in December, 1980, to 17.7 cents (Tr.15).

[7] The trial court found it unnessary to determine whether a 1979 amendment to LSA-R.S. 47:351 affected the constitutionality of Section 353. LSA-R.S. 47:351, as amended, reduces the taxes paid by petroleum wholesalers by fifty percent until such time as federal margin-of-profit controls on gasoline are no longer applicable to the taxpayer's business. Such federal controls were lifted in February, 1981. (Tr.15).

[8] The retail gasoline merchants offered two witnesses, one of whom the trial court accepted as an expert in gasoline retail merchandising:

> "Q. Now, Mr. Bonnaffons, have you formed an opinion as to the effect of the occupational license tax as it was in effect in 1979 and 1980 on the gasoline retailers?
>
> "A. Yes, sir, I have.
>
> "Q. Would you please tell it to the Court?
>
> "A. Well, I think that it is

grossly unfair and it has been discriminatory because we were probably the only category of business who suffered such an increase in an occupational license tax because of actions of foreign countries, for example.***" (emphasis added) (Tr.23)

APPENDIX B-1

SUPREME COURT OF LOUISIANA

NO. 83-CA-1231

R. J. D'HEMECOURT PETROLEUM, ET AL

VERSUS

SHIRLEY MCNAMARA, SEC. OF THE DEPT. OF REVENUE AND TAXATION, STATE OF LOUISIANA

On application for Rehearing

CALOGERO, Justice

I would grant a rehearing to reexamine the constitutionality of La.R.S. 47:353 as it applied to gasoline retailers in 1979 and 1980.

Although La. R.S.47:353 on its face treated all retailers evehandedly in setting annual fees for occupational licenses, its effect on gasoline retailers during the time in question resulted in their having to sustain a

more severe tax burden than did all other respective retailers during the same time period. This more severe burden was not, in my view, rationally related to any legitimate state end and so ran counter to the equal protection guarantees of the state and federal constitutions.

The apparent governmental purpose in instituting the occupational license tax was to raise state tax revenues. The means of a graduated fee schedule for retailers was designed to place the responsibility for higher license fees on those having higher total gross sales. The rationale behind the scheme was that those enjoying higher gross sales more than likely would enjoy higher profits and therefore should be

made to pay a higher occupational tax. However, higher gross sales for the gas retailer during the pertinent tax periods involved in this litigation did not mean that he enjoyed higher profits because of the federal "margins of profit" regulations[1] imposed upon him. The impact on the gas retailers of the upward sliding scale for occupational license fees was at least substantially disporportionate vis a vis other retailers since, among retailers, the gasoline retailer alone was affected by this margin of profits regulation. As a consequence, it cannot be said that gas retailers and other retailers were similarly situated. Unlike the scheme as applied to other retailers, there was no rational connection between the

gross sales of the gas retailers and their ability to pay increased occupational license fees. Their profit per gallon was static notwithstanding substantially increasing gas prices.

Accordingly, because La.R.S.47:353 during the time in question affected not only those retailers to whom higher gross sales meant higher profits, but also those retailers (gasoline) to whom higher gross sales did not mean higher profits (because of the imposition of the federal margin of profits regulation), the statutory classification may have been overinclusive and so subject to an equal protection challenge. It is for

these reasons I would grant a rehearing.

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[1] 10 C.F.R. Sec.212.93 set a ceiling on the cents per gallon profit that gasoline retailers could earn, regardless of the selling price per gallon. Therefore while the margin of profit allowed gas retailers per gallon under the federal regulations rose almost imperceptibly during 1979 and 1980, the price of that gallon of gasoline (and therefore the gross sales of gasoline retailers) increased over 100 percent.

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #16

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 2nd day of February, 1984, the following action was taken by the Supreme Court of Louisiana, composed of Chief Jutice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marccus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

82-B-2812	Louisiana State Bar Association vs. Jerry B. Daye
83-CA-1231	R.J. D'Hemecourt Petroleum, Inc., et al vs. Shirley McNamara, Secretary of the Department of Revenue and Taxacion, State of Louisiana CALOGERO, WATSON, & LEMMON, J.J., would grant a rehearing. (CALOGERO, J., assigns written reasons)

APPENDIX C-1

R.J.D'HEMECOURT PETROLEUM, INC. ET AL	SUIT NO.234,400 DIVISION "I"
DISTRICT COURT	19TH JUDICIAL
VS.	
PARISH OF EAST SHIRLEY MCNAMARA COLLECTOR OF REVENUE FOR THE STATE OF LOUISIANA	BATON ROUGE STATE OF LOUISIANA

CONSOLIDATED WITH

R.J.D'HEMECOURT D/B/A R.J. D'HEMECOURT PETROLEUM,ET AL	SUIT NO.245,394 DIVISION "I" 19TH JUDICIAL
DISTRICT COURT	
VS.	
SHIRLEY MCNAMARA COLLECTOR OF REVENUE FOR THE STATE OF LOUISIANA	PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

In these consolidated cases the plainitffs attack the constitutionality of LSA-RS 47:353 (see Appendix 1) of the Occupational License Tax. The

plaintiffs in these cases are retail gasoline merchants doing business in the State of Louisiana who have paid the occupational license tax under protest pursuant to LSA-RS 47:1576 (see Appendix 2).

The basis of the petitioners' assertions of unconstitutionality under the equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the Louisiana Constitution of 1974, hinges upon the fact that the retail occupational tax is apportioned upon gross sales while allowable 1980 Federal "margins of profit" established in 10 CFR Sec.212.93 (see Appendix 3), limit the amount of profit allowed to be made by the petitioners. As a

direct result of these statutes, the petitioners' profit margins have been shrinking pursuant to the rapid rise of gasoline prices (see Exhibit P-1) since 1974 as opposed to the gradual incline of the federally allowable profit margins. It is this interaction between federal and state law which petitioners assert creates a discriminatory effect on retail gasoline merchants, unlike any other retailer taxed by RS 47:353.

The Occupational License Tax for wholesalers, RS 47:351 was amended in 1979 to provide:

> ...and such taxpayer shall be taxed at fifty percent (50%) of the rate provided in Subsection A of this Section or as a wholesale dealer selling to certain consumers as provided in Section 353.1 until such time as federal

> margin-of-profit controls on gasoline are no longer applicable to the taxpayer's business...

Based upon this amendment plaintiffs have bifurcated their constitutional attack as follows: (1) the unconstitutionality of the occupational license tax (Sec.353) prior to the 1979 amendment of Sec.351, and (2) the unconstitutionality of the tax after the 1979 amendment.

CONSTITUTIONALITY OF SEC. 353 PRIOR TO 1979

The legislative power of taxation is unlimited, except where the constitution expressly limits that power. Saia Motor Freight Lines, Inc. vs. Agerton, 275 So.2d 393 (1973). The equal protection clauses of the Fourteenth Amendment of the United

States Constitution and Article 1 Section 3 of the Louisiana Constitution of 1974 are such limitations. This clause protects a taxpayer from any state action which discriminates against him by subjecting his property to taxes not imposed on others of the same class. The right thus protected is the privilege of receiving equal treatment under law. Bussie v. Long, 286 So.2d 689 (1st Cir, 1973), writ refused January 25, 1974. The equal protection clauses do not require the tax to be capable of administration with absolute equality, however, the clauses do require the tax not to result in intentional or arbitrary discrimination whether resulting from the expressed terms of the statute or

from the effect of its administration. Weissinger v. Boswell, 330 F.Supp. 615 (M.D. Ala., 1971).

There is no disagreement among the parties that Sec. 353 is equal and even handed upon its face. Petitioners argue that this fact is not dispositive of the issue because of the disparity of impact on the retail gasoline merchants due to the convolution of the state and federal statutes described above. It is this interaction that petitioners allege is volatile of the equal protection clauses of the Louisiana and United States Constitution.

The analysis of any equal protection argument under the Louisiana

and United States Constitution is well established in the jurisprudences.

1. Where a classification singles out for differential treatment members of a group "characterized by some unpopular trait of affiliation," New York City Transit Authority v. Beaer, 440 U.S. 568, 593, 99 S.Ct. 1355, 1369, 59 L.Ed.2d 587, 607 (1979), or members of a "discrete and insular minority", United States v. Carolene Products Co., 304 U.S. 144, 153, 58 S.Ct. 778, 784, 82 L.Ed.2d 1234, 1242 (1938), judicial review of the constitutionality of the classification must employ strict scrutiny. Under this standard of review, the political body which has enacted the legislation creating the classification must prove that the legislation bears a necessary relationship to a compelling state interest. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct.995, 31 L.Ed.2d 274 (1972).

2. Similarly, where the legislation creating the classification penalizes the exercise of a fundamental constitutional right, or creates a disparity

in the availability of the opportunity to exercise such a right, strict scrutiny must be employed. Dunn v. Blumstein, supra.

3. In all other instances, the equal protection guarantee is not violated if the classification created by the legislation bears a rational relationship to a legitimate state purpose. As this court stated in Louisiana & Arkansas Ry.Co. v. Goslin, 258 La. 530, 536-537, 246 So.2d 852, 854 (1971).

RS 47:353 creates a class of retail merchants for the purpose of imposition of occupational licenses. This Court finds that the application standard is one of "a rational relationship to a legitimate state purpose" inasmuch as there is no suspect class or fundamental right involved.

There is a presumption in the law of constitutionality of legislation that any classification created by the legislature was done in good faith and that any exclusions made were done for valid reasons. From this it follows that the parties attacking a statute must bear the burden of proving the facts which would render it unconstitutional. Louisiana & Arkansas Ry. Co. vs. Goslin, 246 So.2d 852 (1971).

On first blush, Sec.353 seems to bear the necessary rational relationship to a legitimate state purpose. However, this Court believes petitioners have carried their burden of proof and have shown the statute has a discriminatory effect upon retail

gasoline merchants. The reasons for this decision are as follows:

The supremacy clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

From this language it is obvious that state legislatures do not enact laws in a vacuum. Rather, their promulgation must be considered in relation to federal law in respect to its effects upon the rights of those persons the statute is designed to cover, in these cases retail merchants. Sec.353 was

enacted with the obvious purpose of generating revenue by taxing retailers for the privilege of conducting business and making a profit from sales made within the state. This tax must not have a disparate or discriminatory effect upon any segment of the defined class without there being some rational relationship to a legitimate state interest.

This Court is of the opinion that Sec.353 does not meet this test. This decision is due solely to the enactment of the federal "margins of profit" regulations which cause Sec. 353 to have an unequal effect upon the members of retail occupational license taxpayers. There has been no showing of a rational basis for this

discrimination to uphold it to an equal protection attack. Therefore, this Court declares LSA-RS 47:353 unconstitutional as it applies to retail gasoline merchants. The Collector of Revenue is hereby ordered to refund all monies paid by the petitioners under protest in accordance with RS 47:2110 (Appendix 4).

CONSTITUTIONALITY OF SEC. 353 AFTER 1979

Inasmuch as the Court has determined that Sec. 353 is unconstitutional, it is not necessary to determine the effect of the 1979 amendment of Sec. 351 upon the constitutionality of Sec. 353.

Petitioners' final argument is that taxpayers who did not pay under

protest should also be allowed a refund once Sec. 353 is declared unconstitutional. The First Circuit in Sperry Rand Corp. v. Collector of Revenue, 376 So.2d 505 (1st Cir., 1979), writs denied 376 So.2d 156 (1979), held that even though the Louisiana Supreme Court had previously determined that the Louisiana Use Tax as applied to labor and shop overhead of out of state manufacturer unconstitutional, no refunds could be claimed by taxpayers unless a timely protest had been made with payment of the tax. For this reason petitioner's request for funds to those gasoline retail merchants who did not pay the occupational license tax under protest is denied.

Judgment will be signed accordinlgy.

Baton Rouge, Louisiana, this 18th day of May, 1982.

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JUDGE

FILED MAY 1, 1982

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DY.CLERK OF COURT